IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID CZAPIEWSKI,

OPINION AND ORDER

Plaintiff,

15-cv-208-bbc

v.

TODD RUSSELL, JOHN O'DONOVAN, WILLIAM POLLARD, ANTHONY MELI and JOHN DOE,

Defendants.

- -

Plaintiff David Czapiewski, a prisoner at the Wisconsin Resource Center, has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that his First Amendment, Eighth Amendment and Fourteenth Amendment rights were violated when prison officials at the Waupun Correctional Institution punished him for expressing suicidal thoughts. I must screen his proposed complaint under 28 U.S.C. § 1915A and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the proposed complaint, I conclude that plaintiff alleges sufficient facts to state claims for retaliation, substantive due process and deliberate indifference but not for procedural due

process or "failure to train."

Plaintiff has also filed a motion for preliminary injunctive relief, dkts. ##1, 6, in which he asks the court to order him transported out of the Waupun Correctional Institution. This motion must be denied at this time, because plaintiff did not follow this court's procedures on motions for injunctive relief. If, in the future, plaintiff files another motion for injunctive relief, he should consult the Procedure to be Followed on Motions for Injunctive Relief, attached to this order. This document instructs him to file with his motion all the evidence and all proposed findings of fact supporting his claims, with citations to that evidence. The proposed findings of fact should be in a separate document and should be in separate, numbered paragraphs.

In any event, plaintiff's motion would have to be denied on the merits as well. Shortly after plaintiff filed his complaint, he told the court that he was scheduled to be transferred for treatment at the Wisconsin Resource Center, but he asked the court to grant his relief anyway. Dkt. ##7, 10. Since the filing of his motion, the transfer has been completed; plaintiff is now housed at the Wisconsin Resource Center. As plaintiff anticipated, his transfer to a new prison generally moots his claims for injunctive relief. Maddox v. Love, 655 F.3d 709, 716 (7th Cir. 2011) ("Maddox's prayers for injunctive relief are moot because he is no longer an inmate at Lawrence."). Plaintiff argues that this transfer is temporary so his claims for relief are not moot. However, even if plaintiff's transfer is temporary, plaintiff has not met his burden to show that he is entitled to any relief. In order for this court to order a transfer of a prisoner, that prisoner must prove not only that prison

staff have failed to keep him safe but also that they are *incapable* of doing so. Plaintiff has not made this showing. He says only that some prison staff at Waupun have punished or disregarded his suicidal thoughts, not that the prison is unable to respond appropriately to his mental health needs. Accordingly, plaintiff's motion will be denied.

Plaintiff alleges the following facts in his proposed complaint.

ALLEGATIONS OF FACT

Plaintiff David Czapiewski was housed at the Waupun Correctional Institution from to 2012. He has diagnoses of schizoaffective disorder and bipolar disorder. Prison officials, including correctional officers, at Waupun are aware of plaintiff's psychological problems.

On or about December 14, 2011, plaintiff was housed in the segregation unit at Waupun. He pressed the emergency button in his cell because he was having suicidal thoughts. Defendant Todd Russell, a correctional officer, answered over the intercom, and plaintiff explained his feelings to Russell. Unit Sergeant Billington (who is not listed as a defendant) approached plaintiff's door and asked about plaintiff's feelings. After talking for "a[]while," he told Billington he was feeling better but that he still wished to speak with someone from psychological services. Dkt. #1, at 4. Defendant Russell was aware of plaintiff's psychological problems. Russell did not contact any psychological staff or "security supervisor." (Plaintiff does not explain who what the "security supervisor" is is or why defendant Russell might have contacted that person. Plaintiff also does not say whether Billington contacted anyone.) Later that evening, plaintiff felt worse so he purposefully hit

his head on the metal sink and knocked himself unconscious.

On December 15, 2011, defendant Russell issued a conduct report against plaintiff for "lying," "disobeying orders," "disruptive conduct," and "violat[ing] policies [and] procedures." Id. On December 16, 2011, defendant Anthony Meli, "security supervisor," approved the conduct report and found that plaintiff's acts merited punishment. On December 29, 2011, defendant John O'Donovan, another "security supervisor" at Waupun, ordered plaintiff's punishment of 60 days disciplinary separation. Plaintiff appealed and defendant William Pollard (the warden at Waupan) decreased the punishment to 30 days in segregation.

On or about April 21, 2012, plaintiff was in the segregation unit when he had suicidal thoughts again. He pressed his emergency button and defendant Russell answered. Plaintiff told Russell that he wished to speak to a sergeant. Defendant Russell replied that "'If a [s]ergeant resolves the issue and you don't go to observation you will get another ticket for lying. You can't change your mind or you will get a ticket.'" Id. at 5. Later that day, plaintiff began hitting his head as hard as he could against the corner of the window in his cell, attempting to split his head open. Plaintiff was cut and bruised as a result. Prison officials then moved plaintiff to "observation status." Plaintiff further alleges that "On different occasions, and on different dates and times, defendant Russell has sought to punish [plaintiff] for expressing his suicidal feelings, and [defendant] Russell has deliberately and purposefully aggravated [plaintiff's] symptoms of [] mental illness," and he says that "Defendant Russell has not been properly trained . . . . " Id. at 6.

Plaintiff informed the "Secretary of Corrections" of his problems with defendant Russell but the Secretary did nothing. Neither the Secretary nor defendants Meli and Pollard have trained prison staff members on how to respond to suicidal prisoners.

OPINION

A. Suicidal Thoughts

1. First Amendment

To prevail on a retaliation claim, a plaintiff must prove three things: (1) he was engaging in activity protected by the Constitution; (2) the defendant's conduct was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) the defendant subjected the plaintiff to the adverse treatment because of the plaintiff's constitutionally protected activity. Gomez v. Randle, 680 F.3d 859, 866-67 (7th Cir. 2012).

Plaintiff alleges that defendant Russell issued him a conduct report on December 16, 2011, as a result of his expressing suicidal feelings on December 14, 2011. He further alleges that defendant Meli approved this conduct report and defendants Pollard and O'Donovan issued plaintiff his punishment (ultimately, 30 days of disciplinary separation). The first question is whether plaintiff's expressions of suicidal feelings are protected by the First Amendment. Although prisoners do not retain all rights to speech, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S.

817, 822 (1974). Threats of violence are generally unprotected speech, Jackson v. Thurmer, 748 F. Supp. 2d 990, 1000 (W.D. Wis. 2010), but, in this case, plaintiff was merely expressing his feelings that he might harm himself and was asking for help. At this stage, it is reasonable to infer that plaintiff's speech was protected.

Further, it is reasonable to infer that a conduct report and placement in segregation are sufficiently adverse to deter the average person from engaging in protected activity in the future. Finally, at this stage of the litigation, I must accept as true plaintiff's allegation that defendants Russell, Meli, Pollard and O'Donovan took all of these actions because plaintiff expressed his suicidal thoughts. Therefore, plaintiff will be granted leave to proceed on his retaliation claim against defendants Russell, Meli, Pollard and O'Donovan.

Plaintiff is cautioned, however, that a claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many prisoners make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007). Plaintiff will have to produce evidence that defendants performed these actions because of plaintiff's protected activity and not for "legitimate penological reasons." Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996).

2. Fourteenth Amendment

Plaintiff contends that defendants Russell, Meli, Pollard and O'Donovan violated his rights under the due process clause because they disciplined him for expressing his suicidal feelings. The due process clause of the Fourteenth Amendment protects against substantively and procedurally unconstitutional practices by state actors. Black v. Lane, 22 F.3d 1395, 1402 (7th Cir. 1994). I construe plaintiff's claim as a "substantive due process" claim because he does not allege any facts related to the procedures he received.

"Issuing false and unjustified disciplinary charges can amount to a violation of substantive due process if the charges were in retaliation for the exercise of a constitutional right." Id. In this case, plaintiff alleges that the conduct report and 30 days in segregation were issued against him in retaliation for his constitutionally protected speech. Although this claim largely restates his retaliation claim under the First Amendment, the Court of Appeals for the Seventh Circuit has treated substantive due process claims and retaliation claims separately. Id. See also Sheppard v. Walker, No. 12-cv-703-wmc, 2014 WL 2890787, at *1 (W.D. Wis. June 25, 2014) (after dismissing substantive due process claims because they "were essentially claims for retaliation in violation of the First Amendment," holding on reconsideration that "the Seventh Circuit recognizes an exception to the general rules of Conn and McPherson," and allowing plaintiff to proceed on substantive due process claim" that defendants had issued disciplinary reports against him in retaliation for his expression of suicidal thoughts and his written grievances").

Moreover, it appears that this aspect of plaintiff's claims does not fit under the Eighth Amendment. The court of appeals has held that short stays in segregation, such as 15 days,

are not wrongs under the Eighth Amendment and that unjustified prison conduct reports are not "punishment" under the Eighth Amendment. Leslie v. Doyle, 125 F.3d 1132, 1135, 1137 (7th Cir. 1997) ("A brief stay in disciplinary segregation is, figuratively, a kind of slap on the wrist that does not lead to a cognizable Eighth Amendment claim . . . . [A] frame-up or malicious prosecution is not an example of punishment in the sense of the Eighth Amendment."). See also Lagerstrom v. Kingston, 463 F.3d 621, 625 (7th Cir. 2006) (citing Leslie for the proposition that "the Eighth Amendment provided no protection against" false conduct report). Accordingly, plaintiff will be granted leave to proceed on his substantive due process claim under the Fourteenth Amendment against defendants Russell, Meli, Pollard and O'Donovan.

B. Self-harm

Plaintiff contends that defendant Russell violated the Eighth Amendment by failing to assist him when he expressed suicidal thoughts. The Supreme Court has read the Eighth Amendment to mean that "punishment must not involve the unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976). Thus, a claim under the Eighth Amendment has an objective component and a subjective component. The objective component is satisfied if the plaintiff is exposed to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825 (1994); Prude v. Clarke, 675 F.3d 732, 734 (7th Cir. 2012); Atkins v. City of Chicago, 631 F.3d 823, 830 (7th Cir. 2011); Alvarado v. Litscher, 267 F.3d 648, 651-52 (7th Cir. 2001); Dixon v. Godinez, 114 F.3d 640 (7th Cir. 1997); Antonelli

v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996). With respect to the subjective component in the context of a claim about a prisoner's conditions of confinement, the plaintiff must prove the prison officials were "deliberately indifferent to the adverse conditions." Rice ex rel. Rice v. Correctional Medical Services, 675 F.3d 650, 665 (7th Cir. 2012).

"Deliberate indifference to a risk of suicide is present when an official is subjectively 'aware of the significant likelihood that an inmate may imminently seek to take his own life' yet 'fail[s] to take reasonable steps to prevent the inmate from performing the act.'" Pittman ex rel. Hamilton v. County of Madison, Illinois, 746 F.3d 766, 775-76 (7th Cir. 2014) (alteration in original) (quoting Collins v. Seeman, 462 F.3d 757, 761 (7th Cir. 2006)). See also Minix v. Canarecci, 597 F.3d 824, 833 (7th Cir. 2010); Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003). This reasoning also applies to acts of self-harm. Rice, 675 F.3d 650, 665 (7th Cir. 2012) ("[P]rison officials have an obligation to intervene when they know a prisoner suffers from self-destructive tendencies."). However, "deliberate indifference 'requires a showing of more than mere or gross negligence'[;] . . . . it requires a 'showing as something approaching a total unconcern for the prisoner's welfare in the face of serious risks.'" Rosario v. Brawn, 670 F.3d 816, 821 (7th Cir. 2012) (quoting Collins, 462 F.3d at 462) (citations omitted).

In this case, plaintiff alleges that defendant Russell was aware of plaintiff's serious mental illnesses but disregarded the risk that he would commit self-harm by failing to assist him after his calls for help on December 14, 2011 and April 21, 2012. In both instances, plaintiff committed acts of self-harm. Plaintiff also alleges that defendant Russell has

continued to exhibit this behavior, but he has not provided any details to support his allegation, so it does not state a claim. Accordingly, I conclude that plaintiff's allegations are sufficient at the pleading stage to show that defendant Russell knew of a substantial risk of serious harm to plaintiff's health and safety and that he consciously failed to take reasonable steps to prevent the harm plaintiff suffered on December 14, 2011 and April 21, 2012.

C. Failure to Train

Plaintiff contends that defendants John Doe ("Secretary of Corrections"), Pollard, Meli and O'Donovan have violated his rights by failing to train staff at the prison in dealing with mentally ill prisoners. Supervisors may be liable under § 1983 for failure to train their employees, Kitzman-Kelley, on behalf of Kitzman-Kelley v. Warner, 203 F.3d 454, 459 (7th Cir. 2000), but the circumstances in which such a claim can succeed are very limited. Ghashiyah v. Frank, No. 07-C-308-C, 2007 WL 5517455, at *2 (W.D. Wis. Aug. 1, 2007). Plaintiff cannot merely allege that the supervisors should have done a better job at training. Id. Rather, "the plaintiff must show that the defendant knew that his failure to train was likely to lead to constitutional violations." Id. Supervisors must be personally involved in or responsible for the training and must know that it is so inadequate that employees are likely to violate the Constitution as a result. Jones v. City of Chicago, 856 F.2d 985, 993 (7th Cir. 1988); Mombourquette ex rel. Mombourquette v. Amundson, 469 F. Supp. 2d 624, 651-52 (W.D. Wis. 2007).

In this case, plaintiff alleges no specific facts about the Waupan prison's training of

correctional officers or other staff for handling mentally ill prisoners. Without any factual allegations, it is impossible to tell what if anything plaintiff thinks was inadequate about the training provided by the defendant supervisors. Because plaintiff has failed to allege sufficient facts to state this claim, he will not be granted leave to proceed on it. If follows that plaintiff has also failed to state any claims against defendant "John Doe, Secretary of Corrections," so the complaint will be dismissed as to this defendant.

ORDER

IT IS ORDERED that

1. Plaintiff David Czapiewski is GRANTED leave to proceed on the following claims: (1) defendants Todd Russell, William Pollard, Anthony Meli and John O'Donovan disciplined plaintiff for expressing his suicidal thoughts in violation of the First Amendment and the due process clause of the Fourteenth Amendment; and (2) defendant Russell was deliberately indifferent to plaintiff's mental illness and propensity for self-harm in violation of the Eighth Amendment.

2. Plaintiff is DENIED leave to proceed on his claim that defendants John Doe, Pollard, Meli and O'Donovan failed to train prison employees for plaintiff's failure to allege sufficient facts under Fed. R. Civ. P. 8.

3. Plaintiff's complaint is DISMISSED with respect to defendant Doe.

4. Plaintiff's motion for emergency injunctive relief, dkt. ##1, 6, 7 and 10 is DENIED.

5. For the time being, plaintiff must send defendants Russell, Pollard, Meli and O'Donovan a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

8. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund accounts until the filing fee has been paid in full.

9. If plaintiff is transferred or released while this case is pending, it is his obligation

to inform the court of his new address. If he fails to do so and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 12th day of June, 2015.

BY THE COURT:
/s/

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BARBARA B. CRABB
District Judge